2001

Papanikolas Brothers Enterprises, Gus Papanikolas, Nick E. Papanikolas and John Papanikolas v. Sugarhouse Shopping Center Associates, Spence Clark, James A. Collier, Financial Management Service, American Oild Company, A. R. Curtis and Sons Company, Marvin R. Curtis, Warren E. Swartz, Marjorie Swartz, Robert Honodel, Betty Honodel, Myrne M. Collier, and Jill Clark : Brief of Appellant

Utah Supreme Court

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Jones, Waldo, Holbrook and McDonough; Edward J. McDonough; Attorneys for Respondents.

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

GUS PAPANIKOLAS, NICK PAPANIKOLAS and JOHN PAPANIKOLAS, dba PAPANIKOLAS BROTHERS ENTERPRISES, a partnership,

Plaintiffs-Respondents,

vs.

SUGARHOUSE SHOPPING CENTER ASSOCIATES, a partnership; and SPENCE CLARK, and JAMES A. COLLIER, dba FINANCIAL MANAGEMENT SERVICE; and the AMERICAN OIL COMPANY, a Maryland corporation; and A. R. CURTIS AND SONS COMPANY, a Utah corporation; and MARVIN R. CURTIS; and WARREN E. SWARTZ and MARJORIE SWARTZ; and ROBERT C. HONODEL; and BETTY HONODEL; and MYRNE M. COLLIER; and JILL CLARK,

Defendants-Appellants.

Case No. 13821

BRIEF OF APPELLANTS SUGARHOUSE SHOPPING CENTER ASSOCIATES, SPENCE CLARK AND JAMES A. COLLIER

APPEAL FROM JUDGMENT OF THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
Honorable James S. Sawaya, Judge

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BRIEF OF APPELLANTS SUGARHOUSE SHOPPING CENTER ASSOCIATES, SPENCE CLARK AND JAMES A. COLLIER

STATEMENT OF CASE

Plaintiffs seek mandatory injunctive enforcement of a restrictive covenant. Such enforcement would compel

defendants to remove certain structures and appurtenances to a gas station on 13th East Street and Simpson Avenue in Salt Lake City, Utah.

DISPOSITION IN THE LOWER COURT

The case was tried to the court. The court entered its findings of fact, conclusions of law and judgment denying to plaintiffs any damages but granting them specific injunctive enforcement of the alleged covenant.

RELIEF SOUGHT ON APPEAL

These defendants seek judgment as a matter of law that plaintiffs are not entitled to injunctive relief. In the alternative, defendants seek (1) a new trial or (2) an order dismissing plaintiffs' complaint for failure to join an indispensable party.

STATEMENT OF FACTS

Defendant Sugarhouse Shopping Center Associates is a limited partnership. Defendants Spence Clark and James Collier were, during the relevant periods herein, the general partners in this enterprise. The defendant partnership's primary asset consists of real property in the Union Heights subdivision in the Sugarhouse area of Salt Lake City. This property forms part of a center of retail shops and stores known as the Sugarhouse Shopping Center. Other portions of this Center are owned

by the plaintiffs, Nick, Gus and John Papanikolas, doing business as Papanikolas Brothers.[1]

The Center was developed by the plaintiffs and A. R. Curtis & Sons Company, but these two parties did not form a partnership to hold the land. Each retained its individual ownership interest in the various distinct parcels of property comprising the Center. Beginning in the 1950's, these developers entered a series of agreements reserving certain areas of the Center for parking and for the accommodation of the Center's tenants and their patrons. One of these agreements, dated March 1954 (Ex. 1), reserved, among other areas, a 50-foot portion of the property owned by A. R. Curtis & Sons Company on the east side of the Center abutting 13th East on the north of Simpson Avenue. The agreement, which was recorded, styled this restriction as a covenant running with the land effective until 1999 (Ex. 1).

There were other agreements between the Papanikolas Bros., and A. R. Curtis & Sons. (See plaintiffs' requests for admissions attached and included in the record but unmarked as part thereof.) At trial, over the objection of defendants' counsel (Tr. 29-31), plaintiffs elected to rely for the enforcement of the claimed covenant only on the March 1954 agreement and offered no

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[1]The action was originally brought in the name of Papanikolas Brothers, a partnership. Because of defendants' objection, the individual partners were named as the party plaintiffs at the commencement of the trial. In addition, Warren E. Swartz, Marjorie Swartz, Robert C. Honodel, Betty Honodel, Myrne M. Collier, and Jill Clark were dismissed at the beginning of the trial as parties defendant.

proof as to the effect or meaning of the subsequent agreements.[2]

Sugarhouse Shopping Center Associates acquired the Curtis' interest in the Center in late 1968 and 1969.[3] In October of 1969, the partnership leased the property in the Center facing 13th East and lying north of Simpson Avenue to American Oil Company (Ex. 2). Subsequently these parties executed a lease rider (Ex. 3) which, among other things, acknowledged that the construction of the station "may be in violation" of the recorded 1954 agreement (Ex. 3).

Shortly after the execution of these documents, construction began on the leased premises (Tr. 80). Prior to construction, American Oil placed a sign on the property announcing that a service station would soon be built (Tr. 92). Construction, lasting somewhat longer than normal because of land fill problems on the north edge of the leased premises, was completed in approximately August of 1970 (Tr. 80).

On August 13, 1970, the Papanikolas' attorney wrote

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[2]The other agreements were not offered or received into evidence. Also, these defendants had asserted third party claims against an individual shareholder of A. R. Curtis & Sons for breach of warranty arising from the failure of the selling Curtis shareholders to disclose to defendants the existence of the unrecorded agreements. Because of plaintiffs' election to rely only on the recorded agreement, this third party claim was dismissed by the trial court judge. (Tr. 31).

[3]The method of acquisition was as follows: The partnership acquired the shares of A. R. Curtis & Sons Company, dissolved the Company, and transferred its assets to the partnership.

these defendants claiming that the newly erected station violated restrictive covenants governing the premises (Ex. 5). In response, the partnership's attorney asserted (1) that the covenant had not been violated and (2) that the station was consistent with the use of the property contemplated in the agreement. Papanikolas' attorney countered by suggesting that the construction of the station violated later, more explicit agreements (Ex. 7).

After this exchange of correspondence, the parties had no other contact apart from some desultory and apparently inconclusive discussions about one party selling its interest to the other (Tr. 53-54, 65). On March 6, 1972, more than 18 months after the station was completed, suit was filed (R. 2).

At trial plaintiffs abandoned their damage claims and offered no evidence showing how the alleged violation harmed them. Plaintiffs' evidence showed that part of an overhanging canopy, portions of one pump island, and one sign were within the 50-foot restricted area (Ex. 4; Tr. 42-44). The trial court's injunction requires the destruction of all these improvements and eliminates all access to the station from 13th East Street.

ARGUMENT

POINT I.

THE GRANTING OF THE INJUNCTION WAS IMPROPER.

Plaintiffs offered no proof of damages. Nonetheless,

the trial court ruled that they were entitled to specific enforcement of the claimed covenant in the face of compelling evidence showing very great damage and inconvenience to defendants from the injunction and in spite of long and unexplained delays in seeking enforcement. The central and critical issue in this appeal is, therefore, the propriety of the injunctive relief granted to plaintiffs.

A. *The Injunction Was Improper Because the Evidence Showed That the "Balance of Injury" Was Far Greater to Defendants Than Plaintiffs.*

As indicated, plaintiffs offered no evidence of damage. In fact, although the purpose of the restrictive covenant was to preserve the area for parking (Ex. 1), defendants' evidence demonstrated clearly that the Sugarhouse Shopping Center contained an abundance of parking space, much of it added by defendants since their purchase of the Curtis property. The testimony indicated that no one, including the plaintiffs, had ever demanded more parking area (Tr. 71, 74, 75); nor had anyone, including plaintiffs, ever demanded that the specific area upon which the station is now erected should be used for parking (Tr. 71). The testimony established that during defendants' management of its portions of the Center, there had never been a shortage of parking spaces nor a need for additional parking areas (Tr. 74). Defendants have permitted the use of adjacent property north of the Center for parking (Tr. 71). In addition, the evidence showed that in or around 1970 the area immediately adjacent to the station on the west had

been asphalted and paved to provide 26 additional parking spaces (Tr. 70; Ex. 8). This area provides more parking spaces than could the 50-foot strip in question, and, in addition, as Exhibit 8 shows, this area is much closer to the main shopping area of the Center and the shops owned by plaintiffs than the disputed property.

On the other hand, the evidence showed that the damage to defendants from an injunction will be very great indeed. American Oil indicated that the injunction would ruin the commercial value of the station because access to 13th East Street would be cut off (R. 77-79). This would render American Oil's investment of some $92,000 valueless (R. 77-79) and would deprive the consuming public of a conveniently located filling station (Tr. 79, 94). In fact, there was testimony that the service station had probably increased the value of the entire Center by drawing additional customers, thus benefitting both plaintiffs and defendants (Tr. 95).

The lower court misapplied the law to these facts. Equity does not grant injunctions when defendant's resulting damage outweighs any benefit to the plaintiff. The rule, ofter referred to as the "balance of convenience" or "balance of injury" test, has always been the law of Utah.

In *McGregor v. Silver King Mining Company,* 14 Utah 47, 45 P. 1091 (1896),[4] the trial court granted

[4]Compare also the factually related case of *Crescent Mining Co. v. Silver King Mining Co.,* 14 Utah 57, 45 P. 1093 (1896). This later case was finally settled on a second appeal to this Court, reported at 17 Utah 444, 54 P. 244 (1898).

plaintiff, an owner of certain mining claims, a temporary restraining order prohibiting the defendant mining company from entering upon these claims to dig a trench and lay a pipeline. Plaintiff claimed that the planned pipeline was a trespass which in time would become an easement. Upon defendant's interlocutory appeal, the Supreme Court reversed, setting aside the injunction. In doing so, the Court quoted the following language from *Bassett v. Manufacturing Co.*, 47 N. H. 437, with approval:

> "The power to grant injunctions to prevent injustice has always been regarded as peculiar and extraordinary. . . . *It is not enough that an injury merely nominal or theoretical is apprehended, even although an action at law might be maintained for it; but, to justify the interposition of the summary power, there must be cause to fear substantial and serious damage, for which courts of law could furnish no adequate remedy. . . . If the granting of an injunction would necessarily cause great loss to the defendant, — a loss altogether disproportionate to the injury sustained by the plaintiff, — that fact should be considered, in determining whether the application should be granted, and in some cases it would justly have great weight.* It has often been supposed that when the right has been established at law the plaintiff would be entitled to an injunction as a matter of course; and this misapprehension has arisen, probably, from the fact that, in a large number of cases, injunctions have been refused upon the express ground that the title

> of the plaintiff had not been established at law, leaving room for inference that if it had been so established the injunction would have been issued. *This, however, is clearly the doctrine of courts of equity; for they will not ordinarily exercise this summary and extraordinary power when substantial justice can be done by courts of law.*" (45 P. 1093) (Emphasis added).

Lewis v. Pingree National Bank, 47 Utah 35, 151 P. 558 (1915), also elucidates the balance of injury test. The plaintiff, a jewelry merchant, sought damages and injunctive relief because certain portions of defendant's bank building projected onto and encroached upon a public sidewalk, thereby obstructing the view of his establishment by passersby and depriving him of potential customers. Plaintiff claimed that the encroachment was a public nuisance. The trial court awarded plaintiff both money damages and an injunction requiring defendant to remove the offending encroachment. The Supreme Court reversed, holding that the injunctive relief was improper:

> "In addition to the foregoing, [the Court found that the injunction was improper because of plaintiff's laches] there are also a few other features in this case which operate in favor of the defendant. In view of all the facts and circumstances, what by Mr. Pomeroy (5 Pom. Eq. Jur. § 508) is called "the balance of injury" in cases of encroachment is certainly in favor of the defendant, in so far as that

principle refers to the removal of the front of the bank building. Here we have a case where the street is of the generous width of 132 feet from lot line to lot line, 20 feet of which on either side is devoted to a concrete sidewalk for pedestrians. The public, therefore, in the nature of things, cannot be inconvienced to any great extent by an obstructed passageway. Then, again, it is clearly shown that the construction of the front of the building is such that, if the pillars and reinforced concrete pilasters or columns, which also perform the function of buttresses, are removed, it will weaken the whole front of the building, and thus leave it in a weakened condition. . . . Further, the evidence is to the effect that the front of the building as now constructed is an ornament to any city, and to now tear down and remodel it will entail an expenditure of at least $15,000, and, as we have seen, the architect says that even then the building will not answer the purposes for which it was planned and designed. Upon the other hand, while plaintiff's building is at least to some extent affected, and its use for business purposes is deprectiated in value, yet the depreciation can as readily be ascertained and compensated as that could be done if the building were affected and depreciated in value from some other obstruction. In other words, plaintiff's injury and damages can be adjusted, and he can be compensated without inflicting any unnecessary hardship upon the defendant. May this be done under the law, in view of the facts and circumstances?

"We think that it may not only be done,

> but that under the peculiar facts and circumstances *it is the only way out, without inflicting an unnecessary hardship upon some one.*" (151 P. at 563) (Emphasis added).

The Court restricted the plaintiff to his remedy at law — damages from the encroachment — because of the undue hardship on defendant, the economic waste, and the loss to the community that would result if portions of the building were destroyed by enforcement of the injunction. In the present case, not only is there a showing of hardship upon defendants more extreme than in the *Pingree* case, there are no damages at all to plaintiffs against which the court could weigh defendants' economic loss and the waste of destroying the improvements.

Mary Jane Stevens Co. v. First National Building Co., 89 Utah 456, 57 P. 2d 1099 (1936), involved a rather complicated set of facts. Defendant replaced its old building, which had a common partition wall with plaintiff's building, with a new 13-story structure. Plaintiff alleged that both a subsurface shaft sunk as a foundation for the new building and certain parts of its facade encroached on his property and that the new building caused settling and other damages. Plaintiff sought damages and an injunction requiring defendant to remove the alleged encroachments. The trial court, giving partial relief to plaintiff, apparently satisfied neither party. On appeal, the Supreme Court reversed with instructions

for a new trial. In the course of its opinion, the Court stated:

> "Was the plaintiff entitled to a mandatory injunction as to subsurface encroachment? These encroachments as found by the court did no harm. They were completely out of plaintiff's way and could not possibly interefere with the enjoyment of its property unless deeper excavation was necessary. . . . We do not mean to hold that in certain cases a party might not be compelled to remove subsurface encroachments into the land of another, where they were knowingly made without regard to the other's rights and purely for the benefit of the party encroaching, and where it could be shown that they were a detriment to the use of the other's land and there was no laches or delay in asking for the remedy. Every case must stand on its own facts. . . . In this case, however, there is no curtailment to the use of plaintiff's premises. The mats and walls were not in officious, aggressive or ruthless disregard of plaintiff's rights, but necessary for defendant's structure and removable when plaintiff desires to excavate. . . . *The cost of removing them would be tremendous as compared to the almost negligible benefit such removal would be to plaintiff.* The court was correct in denying the application for the injunction to remove these encroachments. . . ." (57 P.2d at 1125) (Emphasis added).

The Court applied the same balance of injury test to the above-surface intrusions:

"Even those jurisdictions which most severely apply the doctrine that plaintiff had the right to repel what would amount to a condemnation if a mandatory injunction were not issued, recognize the principle that there may be circumstances which in equity would be persuasive of the withholding of the injunction . . . In the case of *Crosby v. Blomerth* . . . and *Mayer v. Flynn,* 46 Utah 598, 150 P. 962, the cost of removing the intrusions was very small compared to the cost involved in removing defendant's structure in this case, and in those cases if the structure remained it would have been an actual nuisance and an inconvenience to the plaintiff. . . . In our own case of *Lewis v. Pingree Nat. Bank,* supra, this court recognized the "balance of injury" theory as designated by Pomeroy (5 Pomeroy Eq. Jr. § 508). True, in that case the court held that the plaintiff might have sooner brought the action, the encroachment being apparent from the beginning of erection of the bank front. ***But it rests primarily on the balance of injury theory; that where the cost of removal would be disproportionate and oppressive compared to the benefits derived from it by plaintiff and where plaintiff can be compensated, the court will not compel the removal.***" (57 P.2d at 1127) (Emphasis added).[5]

[5]The *Mary Jane Stevens* case cited with approval *Mayer v. Flynn,* 46 Utah 598, 150 P. 962 (1915). There the plaintiff claimed that the defendant, mistaking the location of his property boundaries, had erected a house that encroached upon plaintiff's property. The lower court granted judgment for plaintiff compelling defendant to remove the offending structures

[footnote cont'd on next page]

In each of the above cited cases, the plaintiff complained of an actual invasion of his property, either a trespass or encroachment. No invasion is present in this case. The restrictive covenant in fact burdens defendants' premises. In each of the cases the plaintiffs could show at least some actual damage or physical harm. This element is also absent in this case. Plaintiffs offered no proof of damages for the simple reason that the station is, if anything, a benefit to the Center. The balance of injury test is even more persuasive here than in those earlier cases, each of which denied the plaintiff injunctive relief.

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and also awarding plaintiff $1.00 in damages. The Supreme Court affirmed the damage award but reversed with respect to the mandatory injunction:

> "It is not true that where, as in this case, boundary lines of coterminous owners overlap, and where there has been a dispute and uncertainty respecting the actual location of such lines, the law requires that either the lines as described in the deed of one of the parties or that those described in the deed of the other shall be followed. And what is not required by the law in that regard certainly is not required in equity. In a case like this, where no permanent, in fact no, injury can result to the complaining party by granting him what he is entitled to according to his possessory rights, and injustice would result if more were given, the doubt, if any, may well be resolved in favor of the party on whom unnecessary injury would be inflicted by compelling him to undo what in good faith and under a claim of right he did, although he is some slight degree exceeded the legal limits of his rights. The rules of both law and equity, under such circumstances, can be vindicated and justice reflected by compelling the party to undo that, and that only, which equity and good conscience requires." (150 P. at 966).

The court then ruled that the defendant should simply be required to cut off and remove the portion of the eves of his roof which extended out over the roof of the plaintiff's house.

The balance of injury test is of course a general rule of equity. See 42 Am. Jur. 2d, Injunctions, §§57-60 (1969); Annot. 28 A. L. R. 2d 679, 690 (1953).[6] Cf. *Pacific Gas & Electric Co. v. Minnette*, 246 P. 2d 1025 (Cal. App. 1952); *Family Record Plan v. Mitchell*, 342 P. 2d 10 (Cal. App. 1959). It applies as well to suits for specific performance of contracts. As stated in *Trustees of Columbia College v. Thacher*, 87 N. Y. 311 (1882):

> "It certainly is not the doctrine of courts of equity, to enforce, by its peculiar mandate, every contract, in all cases, even where specific execution is found to be its legal intention and effect. It gives or withholds such decree according to its discretion, in view of the circumstances of the case. . . . And so though the contract was fair and just when made, the interference of the court should be denied, if subsequent events have made performance by the defendant so onerous, that its enforcement would impose great hardship upon him and impart little or no benefit to plaintiff." (87 N.Y. at 316-17).

In illustration 3 to Section 359 of the Restatement of Contracts, the following instructive example is given concerning the propriety of ordering specific performance to enforce the terms of a contract:

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[6]This annotation classifies Utah as being one of the jurisdictions following the "balance of injury" rule.

> "A sells to B a lot with a building thereon, retaining adjacent land, B contracting not to make any addition or external alteration without A's written consent. In breach of this contract, B opens a frosted window in the wall of the building to give necessary light for the first floor flat. A sues for a mandatory injunction to compel the closing of the window and for damages. The breach has caused A no substantial harm. It is within the discretion of the court to declare that B has committed a breach, to award a small sum as damages, and to deny an injunction conditionally on B's undertaking never to claim any easement and to keep the window frosted." (A.L.I., Restatement of Contracts, § 359 at 641-642 (1932)).

An instructive example of the denial of injunctive relief in a contract case is *Melrose* v. *Low*, 80 Utah 356, 15 P. 2d 319 (1932). The plaintiff, a physician, had entered a contract with defendant whereby the defendant agreed to pay $5,000 in liquidated damages if, during the term of the contract, he set up private medical practice in Carbon County, Utah. The Court found that there was no showing of irreparable harm to the plaintiff from the defendant's breach, and therefore denied injunctive relief. As the Court stated:

> "But equity requires that he show something more than the mere making of the contract and its breach. *The writ of injunction, as all the authorities above cited go to show, is issued in cases of this kind only to prevent*

great and irreparable injury to the complaining party." (15 P.2d at 321) (Emphasis added).

It is easy to understand why the trial court was perhaps misled on the balance of injury and convenience test. There was simply nothing to balance. Plaintiffs offered no evidence at all of any damage or harm from the alleged violation of the restrictive covenant. All the injury in this case will be borne by defendants from the enforcement of the trial court's injunction, which, if sustained, will alleviate no harm done to plaintiffs. The injunction was improper and judgment should be entered as a matter of law that plaintiffs are not entitled to the specific relief requested.

B. *The Granting of Injunctive Relief Should Have Been Barred Because of Plaintiffs' Laches.*

"Equity aids the vigilant." Injunctive relief is not available to those who sleep upon their rights to the prejudice of the other parties against whom equitable relief is asked. 42 Am. Jur. 2d, Injunctions §61 (1969). The evidence before the trial court can be interpreted in two ways. However — and this is the important point — in either interpretation the trial court should have found plaintiffs guilty of laches.

American Oil began construction of the station in December of 1969. The company placed a sign on the premises announcing to the traveling public that a new station would be built there. Construction took some-

what longer than normal because land fill had to be added to the north end of the premises (Tr. 93).

The record reveals no protest or objection by plaintiffs during construction Mr. Nick Papanikolas testified that, although he regularly traveled along 13th East (Tr. 111, 112), he saw neither the sign nor the construction of the station until August of 1970 when he suddenly noticed construction on the premises (Tr. 107, 111, 112). Not only did the sign and the ensuing construction escape Mr. Papanikolas' notice, the new station was also not noticed by the Papanikolas' manager at the shopping center (Tr. 111). The trial court should not have accepted this unpersuasive testimony and should indeed have held that plaintiffs knew or should have known before August of 1970 that the station was being built.[7] (See Findings of Fact 15, R. 328-329.)

Even if plaintiffs' testimony is believed, the subsequent delays cannot be explained and laches should apply. Plaintiffs' attorneys sent their first letter of complaint (Ex. 5) on August 13, 1970. The attorneys for the partnership replied shortly thereafter that they felt there was no violation (Ex. 6). On September 1, 1970, plaintiffs' attorney again wrote to defendant setting forth additional reasons why they felt there had been a breach. After these contacts, plaintiffs did nothing

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[7]Since plaintiffs requested injunctive relief, this is an equity case, and this Court has power to review the facts and the law. Utah Constitution, Art. VII, § 9; *Metropolitan Investment Co. v. Sine;* 14 Utah 2d 36, 376 P.2d 980 (1962).

until suit was filed in March of 1972, more than 18 months after the station was completed. Plaintiffs were aware all along that defendants felt there was no breach, and, further, that defendants were in no position to comply with plaintiffs' request that certain improvements on the station premises be removed. None of the apparently inconclusive discussions about sale at any time suggested an agreement that defendants would comply with any of plaintiffs' requests as set forth in the August and September 1970 letters. So far as the record reveals, such compliance was not even discussed.[8]

In *Lewis v. Pingree National Bank*, supra, the court found that the plaintiff, though he attempted to deny the fact, knew before the erection of the building that the defendant proposed to project the front of the bank building into the street. The court found that his delay in pursuing his remedy was, in addition to the balance of injury consideration discussed above, enough to preclude granting equitable relief:

> ". . . we are also satisfied that he did not act with a degree of promptness and diligence which, without injury or even inconvenience to himself, he might have done. *He could easily have brought the matter to the attention of the*

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[8]The delay also goes to the question of harm. If the station in any way threatened or caused harm to plaintiffs, why did they wait so long to bring suit? Indeed, the trial court could easily have found that plaintiffs' actions constituted a knowing waiver of plaintiffs' rights in the agreement. Cf. *Proenix Ins. Co. v. Heath*, 90 Utah 187, 61 P.2d 308 (1936); *American Savings & Loan v. Blomquist*, 21 Utah 2d 289, 445 P.2d 1 (1968).

court of equity in time to prevent the construction of the superstructure of the front of the building, or at any rate before any considerable part thereof was constructed." (151 P. at 563) (Emphasis added).

In *Mary Jane Stevens*, supra, laches was also an issue. The court seemed to hold that for those encroachments about which plaintiff had knowledge, laches would be a bar to injunctive relief:

> "It [plaintiff] was not required to object, and if it knew that something was going to be harmful to its property, *failure to speak would not be a tacit consent to that harm, but would work a denial of the remedy of injunction.*"[9] (57 P.2d at 1123) (Emphasis added).

There are numerous cases denying injunctive relief for the enforcement of restrictive covenants because of the plaintiff's laches. Annot., 12 A. L. R. 2d 394 (1950).

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[9]The court did however say that as to those encroachments of which plaintiff had *no knowledge* there could be no laches:

> "A more difficult situation is presented by the intrusions above the ground—the cornice, lintels, and irregularities in the south wall. We find no laches, delay, or estoppel. Plaintiff warned defendant by letter of April 30, 1926, when defendant was pouring cement for the 8-inch wall that the latter was encroaching on its property. While as to those encroachments it did delay in suing for an injunction, as to the encroachments of cornice, walls, or lintels, that could not be discovered until the walls were up." (57 P.2d at 1125).

It should be noted that even in this context the court would preclude injunctive relief for those encroachments of which the plaintiff did have knowledge.

In *Loud v. Pendergast*, 92 N. E. 40 (Mass. 1910), the plaintiff brought suit about four months after work had begun on a house being built in violation of certain setback restrictions. The house was virtually finished and the violation did not cause plaintiff any pecuniary loss. Plaintiff's claim for injunctive relief was denied on the ground of laches. In *Smith v. Spencer*, 87 A. 158 (N. J. Eq. 1913), the plaintiffs became aware of certain violations of setback restrictions in August of 1911. In October of that year, plaintiffs' counsel wrote a letter complaining about the alleged violation. When no satisfactory response was received, the plaintiffs filed suit in December of 1911, at which time the alleged violative building was half completed. The court held that the plaintiffs' claim for injunctive relief was barred by laches. In *McRae v. Lois Grunow Memorial Clinic*, 14 P. 2d 478 (Ariz. 1932), the complaint was filed about two weeks after excavation began upon the foundation of a proposed dental clinic and laboratory. No temporary restraining order was sought and by the time the matter came on for trial, the defendants' building was virtually complete. Injunctive relief was denied on the ground of laches. In *Jones v. Smith*, 241 F. Supp. 913 (D. V. I. 1965), the plaintiffs' claim for injunctive relief was similarly held barred by laches. The plaintiffs claimed violations of restrictive covenants because of defendant's construction of a duplex. The plaintiffs, so the court found, had constructive notice of the defendant's claim for a zoning exception. And before the matter came on

for trial, the defendant spent over $50,000 towards construction of the proposed duplex.

As stated in *Reams v. Vrooman-Fehn Printing Co.*, 140 F. 2d 237 (6th Cir. 1944):

> "It is well settled that 'equity aids the vigilant.' Injunctive relief is reserved for those who manifest reasonable diligence in asserting their rights to equitable protection. Such relief will be denied to the slothful where the power of the court, if exercised, places another in a position from which he will be unable to extricate himself without great injury or damages." (140 F.2d at 242).

Plaintiffs did nothing to stop the construction of the station; and then after demanding compliance with the claimed restrictive covenant, waited 18 months to bring suit. In the meanwhile, American Oil built the station and began serving the public. Plaintiffs' delay was never explained at trial and is, in any event, in no way attributable to the actions of defendants. The lower court should have ruled that plaintiffs' claim for injunctive relief was barred by laches.

C. *The Restrictive Covenant Was Unreasonable, Without Valid Practical Purpose, and Therefore Unenforceable.*

Restrictive covenants are enforceable only so long as they are reasonable and their enforcement relates to the purposes for which the covenant was created. 20 Am.

Jur. 2d, Covenants §182 (1965). In *Metropolitan Investment Co. v. Sine*, 14 Utah 2d 36, 376 P. 2d 940 (1962), the plaintiffs, owners of certain property on North Temple Street in Salt Lake City, brought a quiet title action, essentially seeking relief from a restrictive covenant prohibiting the erection of a motel on plaintiffs' premises. Plaintiffs claimed that significant change in the neighborhood had rendered the covenant unreasonable and unenforceable. The court held the covenant enforceable because at the time of the execution of the deed containing the covenant, motel construction in the neighborhood was contemplated and there was increased business activity in the area, both facts making the covenant valuable to the grantors. The court did, however, state with explicit clarity:

> "The second point in contention on this appeal is the finding of the trial court that the restriction was not of benefit to the defendants but only served as a detriment to the plaintiff and therefore should not be enforced. *The parties are in agreement that the restriction should be ignored if it confers no benefit on the defendants, thereby rendering the restrictive covenant useless but we disagree as to its purpose and effect.* We agree that there is no reason for continuing the restriction unless there is a benefit to be realized by the defendants. Restrictive covenants will not be enforced where enforcement is no longer of general usefulness, nor capable of serving purpose for which restriction was imposed, or reason of restriction has

ceased." (376 P.2d at 944) (Footnotes omitted, emphasis added).

The covenant upon which plaintiffs rely provides that the restrictive areas were to be used for:

> "Parking areas for motor vehicles to be used in common by the parties hereto and the tenants of their respective land described above . . . and for the accommodation of customers of such tenants and the parties hereto, while transacting business with said parties or shopping in the premises of the tenants of the last mentioned parcels of land." (Ex. 1).

Paragraph 2 of the agreement clearly provides the parties will supply additional parking areas as needed:

> "Neither party hereto will build or permit to be built any building or structure on any of their respective land described as parcels A, B, and C of Recitals I and II of this Agreement, if such building or structure would result in lowering the said ratio of said parking areas to said floor areas unless the parties shall ajointly require the additional parking areas." (Ex. 1).

Thus, the restrictive agreement provides that its purpose is to insure that there be adequate parking to meet the needs of the shopping center. The evidence at trial was clear that such needs are more than adequately being met.

The station, so the record reveals, is situated on the east end of the Center, far from the main buildings and parking areas (Ex. 8). The record reveals no demand by any tenant, by the plaintiffs, or by anyone else that the leased premises be used for additional parking (Tr. 75). As pointed out, the area immediately to the west of the station was asphalted in about 1970 to provide 26 parking spaces not available at the time of the execution of Exhibit 1 (Tr. 70; Ex. 8). Perhaps even more significantly, the property owned by the Papanikolas Bros. directly west of this recently provided parking space has never been asphalted or improved for parking (Tr. 72; Ex. 8). If there were a need for additional parking in the Center, the question is obvious: Why are not plaintiffs improving and using this area for that purpose? The evidence revealed that the 699 spaces currently provided in the Center are ample (Tr. 71). There has never been a time when the demands upon the Center exceeded the available parking space (Tr. 74). In addition, as testified at trial, defendants have supplied from property adjacent to the north of the Center some additional 45 parking spaces to be used by the tenants and patrons of the Center (Tr. 71). The evidence thus shows that, as a matter of law, the enforcement of the claimed covenant with respect to the 50-foot strip on the east end of the Center is unreasonable, because such enforcement does nothing to benefit plaintiffs, but produces great injury to defendants on the basis of a covenant the purposes of which are clearly being fulfilled.

D. *The March* 1954 *Agreement Is Ambiguous, the Evidence Reveals That Plaintiffs Tacitly Recognize Such Ambiguity, and Such an Agreement Should Therefore Not Be Specifically and Strictly Enforced by Injunctive Relief against Defendants.*

Restrictive covenants restrict the free use and alienation of property and are, therefore, not favored in the law. 7 Thompson on Real Property, §3567 (Perm. Ed. 1940); *Sine v. Western Travel, Inc.*, 19 Utah 2d 61, 426 P. 2d 9 (1967); Cf. *Wade v. Dorius*, 52 Utah 310, 173 P. 564 (1918); *Weggeland v. Ujifusa*, 14 Utah 2d 366, 384 P. 2d 591 (1963).

As pointed out, the alleged restrictive covenant contains two provisions. It provides that the areas designated are "to be used in common by the parties hereto and the tenants of their respective land . . . for the accommodation of such tenants and the parties hereto, while transacting business with said parties or shopping in the premises of the tenants of the last mentioned parcels of land" (Ex. 1). The erection of the service station is perfectly consistent with this language. Plaintiffs seem to admit the validity of this position. The original August 13 letter of plaintiffs' attorneys to Mr. Clark and Mr. Collier claimed that the American Oil station violated agreements of June 8, 1953, and July 14, 1965 (Ex. 5). In response thereto, defendants' attorneys upon review of the March 24, 1954, agreement stated:

> "Among other thing, that agreement provided that the 50-feet abutting 13th East is to be used
>
> > 'for the accommodation of customers of such tenants . . . while transacting business with said parties or shopping in the premises of the tenants . . .' " (Ex. 6).

Plaintiffs' response to the August 25 letter is interesting. Rather than deny defendants' position, the letter asserts that the March 24, 1954, agreement was modified and presumably clarified by agreements of April 21, 1958, and July 14, 1965. Indeed, the letter claimed that it is the July 14, 1965, agreement prohibiting building on the premises that is controlling. Plaintiffs, obviously recognizing the inherent ambiguities in the original agreement, sought to assert the unrecorded agreements of which defendants had no knowledge as a basis for this claimed violation of a restrictive covenant. (See Affidavits of Spence Clark and Frederick S. Prince, Jr.; R. 284-288; 61-67).

In fact, until the day of trial plaintiffs' legal theory depended on the validity of the 1965 agreement. The original complaint, alleging only one cause of action, was based on this later agreement (R. 2-5, 9). The amended complaint, though adding additional claims under other agreements, was also based in part on the 1965 document (R. 69-86). Plaintiffs no doubt chose to rely originally on the 1965 agreement because of that document's restriction on building on the east 50 feet adjacent to 13th

East. In so doing, plaintiffs were apparently concerned about the ambiguity and difficulty of enforcing the original 1954 recorded agreement. For reasons of their own,[10] plaintiffs chose at trial to rely only on the original recorded agreement. The effect of this practical choice, because of the ruling of the court permitting plaintiffs to do so, was to deprive defendants of their opportunity to show the ambiguity in the agreement. Defendants should have had the opportunity to do no more than plaintiffs were doing in their own correspondence. In any event, plaintiffs cannot have it both ways. They cannot maintain in correspondence that it is the subsequent agreements which clarify the original ambiguities and determine the extent of the defendants' rights, and then come into court and claim, on the basis of the original agreement, that there has been a violation of the restrictive covenant.

POINT II.

THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO JOIN AN INDISPENSABLE PARTY.

At trial, American Oil's counsel represented to the court that Americal Oil Company had subleased the

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[10]Plaintiffs probably made this choice because it was clear that none of the defendants had any notice of the subsequent agreements.

premises to one Peter R. Murdock (Tr. 4). Apparently this fact was discovered by American Oil's attorneys only the Friday before the trial which began on a Monday. Mr. Murdock was not notified of the trial nor of any of the previous proceedings in the case (Tr. 5).

An indispensable party is one whose presence is needed for a full and complete adjudication of the controversy. Rule 19(a), U. R. C. P.; 3A Moore's Federal Practice, ¶19.01-1[2]; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 447 (1855); *Hoyt v. Upper Marion Ditch Co.*, 94 Utah 134, 76 P. 2d 234 (1938); Cf. *Stone v. Salt Lake City*, 11 Utah 2d 796, 356 P. 2d 631 (1960); *Baten v. Nona P. Fletcher Mineral Co.*, 198 F. 2d 629 (5th Cir. 1952).

Mr. Murdock would not be an indispensable party in an action for money damages for breach of contract. If, however, his lease agreement with American Oil gives him control and possession of the premises, his presence in these proceedings is essential. The court's judgment is directed to the defendant American Oil Company to remove all "buildings, structures, signs, posts, paving, landscaping or other construction" from the designated areas (R. 333-35).[11] If American Oil does not, however, have possessory control of the premises, compliance with the judgment may force it to violate its sublease agreement with Mr. Murdock.

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[11]This provision of the judgment is particularly difficult to understand. If the covenants were to provide areas for parking, why should paving, the prime essential of good parking areas, be removed?

Murdock has another reason to complain. The order, assuming arguendo that American Oil is entitled to enter the premises to comply, in effect puts Murdock out of business, takes away his livelihood, and threatens him with possible irreparable harm, all with no opportunity to be heard and to present his case. To say that he has a potential action against American Oil for damages is small consolation for one left only with the prospect of possibly protracted litigation. Due process and the law of indispensable parties demands that the sublessee be heard before the allegedly offending appurtenances can be removed.

The motion to dismiss for failure to join an indispensable party may be made at any time. 3A Moore's Federal Practice, ¶19.19. In *Hoyt v. Upper Marion Ditch Co.*, supra, the court quoted with approval the following language from the Illinois case of *Gaumer v. Snedeker*, 330 Ill. 511, 162 N. E. 137 (1928):

> "Whenever a party has been omitted whose presence is so indispensable to a decision of the case upon its merits that a final decree cannot be made without materially affecting his interests, the court should not proceed to a decision of the case upon the merits. The objection may be made by a party at the hearing or on appeal or error, and the court will upon its own motion take notice of the omission and require the omitted party to be made a party to the litigation even though no objection is made by any party litigant." (76 P.2d at 240).

CONCLUSION

The balance of equities in this case clearly preponderates in favor of defendants. To force compliance with the restrictive covenant is to impose great loss on defendants, to deprive the public of a conveniently located service station, to disregard the rights of an indispensable party, all in the face of no harm or damage to plaintiffs. In fact, plaintiffs' own position with respect to the claimed covenant implicitly admits that the service station is consistent with the purposes of the March 24, 1954, agreement, or at least that that agreement is so ambiguous that enforcement of the restrictive covenant is improper as a matter of law. The judgment of the trial court should be reversed.

Respectfully submitted,

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